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13

14 **UNITED STATES DISTRICT COURT**
15
16 **CENTRAL DISTRICT OF CALIFORNIA**

17
18 ZUMBA FITNESS, LLC, a Florida
Limited Liability Company,
19

20 Plaintiff,

21 vs.

22 WILLIAM CHESTER MOORE, an
23 Individual, and Does 1-10, Inclusive,
24

25 Defendants.
26
27
28

Case No.: CV11-02448 PA (MANx)

**NOTICE OF MOTION AND
MOTION FOR ENTRY OF
DEFAULT JUDGMENT BY
COURT; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF ANI
SAKALIAN IN SUPPORT
THEREOF**

Date: July 18, 2011
Time: 1:30 p.m.
Courtroom: 15

1 TO THE DEFENDANT AND TO THE COURT:

2 PLEASE TAKE NOTICE THAT on Monday, July 18, 2011, at 1:30 p.m., or
3 as soon thereafter as this matter may be heard in Courtroom 15 of the above-
4 entitled Court, located at 312 N. Spring Street, Los Angeles, California 90012,
5 Plaintiff ZUMBA FITNESS, LLC will present its motion for entry of default
6 judgment against Defendant WILLIAM CHESTER MOORE for damages and
7 injunctive relief. This application is made pursuant to Rule 55(b) of the *Federal*
8 *Rules of Civil Procedure* ("Fed.R.Civ.P.") which provides for a court ordered
9 default judgment following entry of default by the court clerk under *Fed.R.Civ.P.*
10 55(a), and pursuant to 15 *United States Code* ("U.S.C.") §§ 1114, 1125(a) and (c),
11 and 17 U.S.C. §501(a).

12 This application is based upon this Notice of Motion for Entry of Default
13 Judgment by Court, the attached Memorandum of Points and Authorities, and the
14 Declaration of Ani Sakalian filed concurrently herewith, the papers and records on
15 file herein, and upon such oral and documentary evidence as may be presented at
16 the hearing of this matter.

17
18 DATED: June 9, 2011

JOHNSON & PHAM, LLP


19
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21 By: 
22 Ani Sakalian, Esq.
23 Attorneys for Plaintiff
24 ZUMBA FITNESS, LLC
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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

Plaintiff ZUMBA FITNESS, LLC ("Plaintiff") is a health, wellness and fitness company involved in, among other things, the development, production, sale, marketing, and distribution of fitness programs, fitness DVDs, fitness products, and fitness apparel. One of the main components of Plaintiff's business encompasses the production, sale and distribution of its Zumba® fitness programs, fitness DVDs, fitness products, and fitness apparel, including its famous Zumba Fitness® DVDs, Zumba® Toning Sticks and Zumba® apparel. *See* Complaint ("Compl.") at ¶10.

Plaintiff owns numerous trademarks and copyrights for its Zumba® and Zumba Fitness® DVDs, and related products. *See* Compl. at ¶17-20, and Ex. "A"- "U," thereto. Defendant WILLIAM CHESTER MOORE ("Defendant") is an individual residing at 528 Wilson Road, Annapolis, Maryland 21401-1052. *See* Compl. at ¶2; *see also* Declaration of Ani Sakalian ("Sakalian Decl.") at ¶2.

Plaintiff investigates and enforces against the manufacturing, copying, exporting, importing, advertising, promoting, selling, and distributing of counterfeit, or otherwise unauthorized, versions of its Zumba®-branded fitness products. *See* Compl. at ¶22-28. On March 13, 2011, Plaintiff purchased a purported "ZUMBA FITNESS 4 DVD Box Set Factory Sealed" from Defendant from the Internet auction website known as eBay.com ("eBay"), under seller ID "showswel," for a cost of \$63.99 charged to the PayPal electronic payment account of Plaintiff's investigator. *See* Compl. at ¶24, and Ex. "V," thereto; *see also* Sakalian Decl. at ¶3, and Ex. "A" - "B," thereto. The product purchased from Defendant was inspected to determine authenticity. The inspection of the purchased item confirmed that the item Defendant sold to the investigator were, in fact, counterfeit and unauthorized Zumba® fitness DVDs. *See* Compl. at ¶25; *see also* Sakalian Decl. at ¶4, and Ex. "C" - "D," thereto.

1 Plaintiff filed its Complaint against Defendant on March 23, 2011, and
 2 Defendant was served with a copy of the Summons and Complaint on April 8,
 3 2011. *See Sakalian Decl. at ¶5.* Pursuant to Rule 55 of the *Federal Rules of Civil*
 4 *Procedure* (“*Fed.R.Civ.P.*”), a party seeking default judgment must first have the
 5 clerk enter the default. *Fed.R.Civ.P.* 55(a). Plaintiff requested entry of default
 6 against Defendant on May 5, 2011, and the clerk entered default of said Defendant
 7 on May 17, 2011. *See Sakalian Decl. at ¶6.*

8 II. LEGAL STANDARD

9 Sufficient grounds exist for the entry of a default judgment against the
 10 Defendant. The Ninth Circuit has enumerated several factors the Court should
 11 consider in deciding whether to grant default judgment: the possibility of
 12 prejudice to the plaintiff, the merits of plaintiff’s substantive claim, the sufficiency
 13 of the complaint, the sum of money at stake in the action, the possibility of a
 14 dispute concerning material facts, whether the default was due to excusable neglect,
 15 and the strong policy underlying the Federal Rules of Civil Procedure favoring
 16 decisions on the merits. *See Eitel v. McCool*, 782 F.2d 1470, 1471-1472 (9th
 17 Cir.1986). In considering the above factors, the Court takes all factual allegations
 18 in the Complaint as true, except for those relating to damages. *See TeleVideo*
 19 *Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-918 (9th Cir.1987).

20 III. ANALYSIS OF EITEL FACTORS

21 Application of the facts in this matter to the Eitel factors warrant entry of a
 22 default judgment in favor of Plaintiff.

23 A. Prejudice to Plaintiff

24 In light of the fact that the only Defendant in this case has not defended
 25 himself in this action, absent a default judgment, Plaintiff will not be compensated
 26 for its losses and will accordingly be prejudiced. Moreover, if this Court fails to
 27 enter a default judgment against Defendant, in light of his failure to defend this
 28 action, it will set a devastating precedent allowing infringers to avoid liability by

effectively not responding to Plaintiff's claims further prejudicing Plaintiff's ability to enforce its intellectual property rights. Furthermore, in the absence of injunctive relief, Plaintiff will continue to suffer harm from the violations committed by Defendant of its trademark and copyright rights.

Accordingly, this first Eitel factor, the possibility of prejudice to the plaintiff, weighs in favor of granting default judgment.

B. Plaintiff's Substantive Claims are Meritorious

(Analyzed below under, and concurrent with, subsection C.)

C. Sufficiency of Plaintiff's Complaint

The second and third Eitel factors, concerning the merits of Plaintiff's substantive claims and the sufficiency of its Complaint, also weigh in favor of granting a default judgment in favor of Plaintiff against Defendant.

Plaintiff has alleged seven (7) causes of action in its Complaint against Defendant, to wit: (1) FEDERAL TRADEMARK INFRINGEMENT [15 U.S.C. §1114/*Lanham Act* § 32(a)]; (2) FEDERAL COPYRIGHT INFRINGEMENT [17 U.S.C. §501(a)]; (3) FALSE DESIGNATION OF ORIGIN/UNFAIR COMPETITION [15 U.S.C. §1125(a)/*Lanham Act* § 43(a)]; (4) TRADEMARK DILUTION [15 U.S.C. §1125(c)]; (5) UNFAIR BUSINESS PRACTICES [*CALIFORNIA BUSINESS & PROFESSIONS CODE* §17200]; (6) UNFAIR COMPETITION (California Common Law); and (7) UNJUST ENRICHMENT.

1. Trademark Infringement Claim

The essential elements of the infringement of trademark registration and false designation of origin claims are identical. *See Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1047 (9th Cir.1999). Moreover, the 9th Circuit has consistently held that actions pursuant to *CALIFORNIA BUSINESS & PROFESSIONS CODE* §17200 are "substantially congruent" to claims made under the Lanham Act. *See Philip Morris v. Shalabi*, 352 F.Supp.2d 1067, 1072 (C.D.Cal.2004). Therefore, analyzing the merits of the

1 infringement claims is sufficient because the standard of infringement, i.e., the
 2 likelihood of confusion, is essentially implicated in the remaining federal and state
 3 causes of action. *See M2 Software, Inc. v. Madacy Entertainment Corp.*, 421 F.3d
 4 1073, 080 (9th Cir.2005).

5 To prove a claim of trademark infringement under Section 32(1) of the
 6 *Lanham Act*, a plaintiff must show that: it owns the trademark at issue, the
 7 defendant has used in commerce, without authorization, a copy, reproduction,
 8 counterfeit or colorable imitation of the plaintiff's mark in connection with the sale,
 9 distribution, or advertising of goods and services, and the defendant's use of the
 10 mark is likely to cause confusion or to cause mistake or to deceive. *See 15 U.S.C.*
 11 *§ 1114(1)*. In its Complaint, Plaintiff alleges all facts necessary to prove trademark
 12 infringement, along with false designation of origin and unfair business practices,
 13 by Defendant.

14 **(a) Plaintiff's ownership of trademarks at issue**

15 First, Plaintiff adequately alleges its ownership of twelve (12) trademarks at
 16 issue. *See* Compl. at ¶17, and Ex. "A"- "L," thereto. A federal registration of a
 17 mark constitutes prima facie evidence of its validity and of plaintiff's exclusive
 18 rights to the mark. *See Brookfield Communications*, 174 F.3d at 1047.

19 **(b) Defendant's use of Plaintiff's trademarks in**
 20 **commerce**

21 Second, the "use in commerce" requirement is satisfied as to Defendant.
 22 Plaintiff alleges that Defendant sold counterfeit Zumba®-branded fitness DVDs,
 23 specifically, four (4) counterfeit Zumba Fitness® DVDs, for a cost of \$63.99 on
 24 eBay, and that Defendant used images confusingly similar or identical to Plaintiff's
 25 Zumba® and Zumba Fitness® trademarks without consent or authorization to sell
 26 the counterfeit Zumba® fitness DVDs. *See* Compl. at ¶24, and Ex. "V," thereto;
 27 *see also* Sakalian Decl. at ¶3, and Ex. "A" - "B," thereto.

28 ///

(c) **Likelihood of confusion**

The third element of trademark infringement is the likelihood of confusion, or whether the similarity of the marks is likely to confuse customers about the source of the products. *See E & J Gallo Winery v. Gallo Cattle*, 967 F.2d 1280, 1290 (9th Cir.1992). Likelihood of confusion is analyzed using an eight-factor test established by the Ninth Circuit, i.e.: (i) strength of the allegedly infringed mark; (ii) proximity or relatedness of goods; (iii) similarity of sight, sound, and meaning of marks; (iv) degree to which marketing channels converge; (v) type of goods and degree of care consumers are likely to exercise in purchasing goods; (vi) intent of the Defendant in selecting the allegedly infringing mark; (vii) evidence of actual confusion and likelihood that the parties will expand their product lines; and (viii) conclusion. *See AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-349 (9th Cir.1979). Applying this test to Plaintiff's Zumba® marks and Defendant's infringement thereof by selling counterfeit Zumba Fitness® DVDs should lead this Court to conclude that Plaintiff has successfully pled a likelihood of confusion.

(i) Strength of the allegedly infringed mark

The strength of Plaintiff's Zumba® and Zumba Fitness® marks is adequately alleged in Plaintiff's pleadings and weighs in favor of a likelihood of confusion.

The strength of a mark is based on the distinctiveness of the mark and whether it has acquired secondary meaning, i.e., whether it has come to be associated with a good or service. *See Gallo Cattle*, 967 F.2d at 1291. Plaintiff's Zumba® mark is suggestive, as applied to its Zumba Fitness® DVDs, which includes, amongst other works: four (4) different DVDs including a Latin-inspired dance-fitness program that blends red-hot international music, created by Grammy Award-winning products, and contagious steps to form a "fitness party" that is downright addictive. *See Compl.* at ¶10; *see also Sakalian Decl.* at ¶7, Ex. "E," thereto. Suggestive marks are those which convey an impression of a good but

1 require the exercise of imagination and perception to reach a conclusion as to the
2 product's nature. *See Brookfield Communications*, 174 F.3d at 1058 (providing as
3 an example of a suggestive mark, "Roach Motel" for insect traps); *see also Thane*
4 *International, Inc. v. Trek Bicycle*, 305 F.3d 894, 912 (holding that a bicycle
5 manufacturer's "TREK" trademark was suggestive, because 'trek' means a long
6 journey, and one can undertake a long journey on a bicycle). Here, Plaintiff's
7 Zumba® and Zumba Fitness® marks and the message behind use of the fitness
8 DVDs in the Zumba® DVD box set evoke a sense of exhilaration, effective, easy-
9 to-follow, Latin-inspired, calorie-burning dance fitness party™ that's moving
10 millions of people toward joy and health. *See Sakalian Decl.* at ¶7, Ex. "E,"
11 thereto.

12 The length of time that Plaintiff has used its mark in the marketplace further
13 establishes the strength of the mark. Plaintiff alleges in its Complaint that it has
14 been using the Zumba® trademark since as early as 2001. *See Compl.* at ¶10, 17,
15 and Ex. "A"-"L," thereto. Thus, the status of this mark as a suggestive mark,
16 coupled with the duration of its use in the marketplace, establishes that it is a
17 strong mark, which makes consumer confusion more likely. *See Joujou Designs,*
18 *Inc. v. Jojo Ligne Internationale*, 821 F.Supp. 1347, 1353-1354 (N.D.Cal.1992).

19 Moreover, Plaintiff has spent substantial time, money and effort in
20 developing consumer recognition and awareness of its marks, copyrights and
21 products. Plaintiff has spent an enormous amount of money on print and internet
22 advertising in order to inform consumers of the benefits Plaintiff's products and
23 services. Through the extensive use of the Plaintiff's marks, Plaintiff has built up
24 and developed significant goodwill in its entire fitness product line. A wide array
25 of newspapers, magazines and television networks have included advertising of
26 Plaintiff's products, which are immediately identified by Plaintiff's marks and
27 have featured full length articles describing both the popularity and benefits of the
28 Zumba® Fitness products, apparel and programs. These periodicals and new media

1 outlets have included, The Washington Post, CNN, The New York Times, Shape
2 Magazine, The Wall Street Journal, Redbook, Time Magazine, Readers Digest,
3 The London Times, Reuters, SELF Magazine, Cosmopolitan Magazine, Variety
4 Magazine as well as many others. *See* Compl. at ¶12.

5 Plaintiff is also heavily involved in and uses its popularity to pursue
6 charitable and socially beneficial goals. For example, small support groups at
7 Zumba classes across the country started organizing Zumbathon™ charity events
8 to raise money for breast cancer and other worthy causes. Over 1,200 of these
9 charity events have already occurred, about one hundred of which have occurred in
10 California. The numbers grew so high that Plaintiff itself instituted a formal
11 campaign of Party in Pink™ Zumbathon™ charity events, with more than 725
12 events (so far), seeking to raise awareness of breast cancer and funding for the
13 pursuit of a cure. Plaintiff also started a campaign of Party Hearty™ Zumbathon™
14 charity events with the American Heart Association, seeking to raise awareness of
15 heart disease, with hundreds of events in the works and over 400 already having
16 taken place. *See* Compl. at ¶13.

17 As a result of Plaintiff's efforts, the high degree of promotion and the quality
18 and popularity of the Zumba® products and classes, the Zumba® marks and the
19 Zumba® fitness DVDs, products, and services have been prominently placed in the
20 minds of the public. Consumers, purchasers and the members of the public have
21 become familiar with the Plaintiff's intellectual property, fitness DVDs, fitness
22 programs and other products and services, and have come to recognize the
23 Zumba® marks, products and services and associate them exclusively with
24 Plaintiff – Plaintiff has acquired a valuable reputation and goodwill among the
25 public as a result of such association. Indeed, the Zumba® marks are famous in
26 the United States. *See* Compl. at ¶14.

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28 ///

(ii) Proximity or relatedness of goods

The second factor, the proximity or relatedness of Plaintiff's authentic Zumba Fitness® DVD box set and the Zumba® DVDs therein, and Defendant's counterfeit versions thereof, also points toward a likelihood of confusion. The more related or complementary goods are, the higher the danger of consumer confusion. *See Gallo Cattle*, 967 F.2d at 1291. Here, the infringed marks and infringing marks appear on identical goods – fitness sets and DVDs. More specifically, both products bear the marks Zumba® and Zumba Fitness®. *See Sakalian Decl.* at ¶4, and Ex. "C" - "D," respectively (photographs of Plaintiff's authentic Zumba Fitness® 4 DVD box set and the Zumba® fitness DVDs therein, and Defendant's infringing Zumba® fitness DVDs).

(iii) Similarity of sight, sound, and meaning of marks

The third factor, similarity of sight, sound, and meaning of the marks also supports a finding of likelihood of confusion. Where, as here, the products bearing the disputed marks are identical, even less similarity is required to demonstrate a likelihood of confusion. *See Sleekcraft*, 599 F.2d at 350. Given this low standard, Plaintiff has easily and adequately demonstrated that the marks are similar. Marks should be compared based on their sight, sound, and meaning as they appear in the marketplace, and similarities between marks should be weighed more heavily than differences. *See Sleekcraft*, 599 F.2d at 350. Plaintiff has submitted photographs of its authentic product along with photographs of the counterfeit product purchased from Defendant with the Zumba® and Zumba Fitness® marks clearly displayed. *See Sakalian Decl.* at ¶4, and Ex. "C" - "D," respectively (photographs of Plaintiff's authentic Zumba Fitness® 4 DVD box set and the Zumba® fitness DVDs therein, and Defendant's infringing Zumba® fitness DVDs). Under the lower standard for marks used for identical products, Defendant's use of Plaintiff's Zumba® and Zumba Fitness® marks is sufficiently similar in sight, sound, and meaning.

(iv) Degree to which marketing channels converge

In considering the marketing channels used by Plaintiff and Defendant, the channels largely overlap, which makes consumer confusion more likely. Plaintiff markets its Zumba® fitness DVD sets on television infomercials and on its Internet website: www.zumba.com. See Compl. at ¶12; see also Sakalian Decl. at ¶7. Defendant sold his counterfeit “ZUMBA FITNESS 4 DVD Box Set Factory Sealed” on eBay, seller ID “showswel,” thus reaching the same type of potential consumer as Plaintiff. See Sakalian Decl. at ¶3-4, and Ex. “A” - “B,” thereto.

(v) Type of goods and degree of care consumers are likely to exercise in purchasing goods

The goods in question in the instant case are fitness sets and DVDs, specifically, four (4) different fitness DVDs that Plaintiff offered for sale as part of its Zumba® fitness 4 DVD box set. Plaintiff’s Zumba® fitness 4 DVD box set kit is relatively inexpensive. See Sakalian Decl. at ¶8. Thus, the presumption that buyers of expensive products exercise greater care is not applicable here.

(vi) Intent of the Defendant in selecting the allegedly infringing mark

Though bad intent is not necessary to demonstrate a likelihood of confusion, where the plaintiff establishes that defendant knowingly used an infringing mark, there is a presumption that the infringer will accomplish his purpose, and the public will be deceived. See Sleekcraft, 599 F.2d at 354. Plaintiff has submitted evidence to demonstrate that Defendant was aware or should have been aware that he was selling counterfeit Zumba®-branded merchandise. See Sakalian Decl. at ¶9, and Ex. “F,” thereto. Moreover, Defendant’s failure to defend against Plaintiff’s Complaint, which includes allegations of bad faith, intent, and willful conduct, see Compl. at ¶26-28, is indicative of Defendant’s knowledge regarding the source of his infringing products and the counterfeit nature of the products he sold.

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(vii) Evidence of actual confusion and likelihood that the parties will expand their product lines

Consumers are being confused everyday by Internet auction site sellers such as Defendant. Counterfeit version of Plaintiff's Zumba Fitness® 4 DVD box sets, and the Zumba® fitness DVDs therein, like those sold by Defendant, have flooded the market leading consumers to believe that the counterfeit versions being sold are, in fact, authentic when they clearly are not. *See Sakalian Decl. at ¶4, and Ex. "C" - "D," thereto.*

Plaintiff has no evidence with respect to whether Defendant will expand his product line.

(viii) Conclusion

Taking all the allegations of the Complaint as true, Plaintiff has adequately pled and demonstrated that it's Zumba® and Zumba Fitness® marks would likely be confused with Defendant's use thereof on counterfeit versions of Plaintiff's Zumba® fitness 4 DVD box sets.

2. Copyright Infringement Claim

To prove a claim of copyright infringement, a plaintiff must show: ownership of a valid copyright, and copying of constituent elements of the work that are original. *See Feist Pubs., Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 361 (1991). In its Complaint, Plaintiff alleges all facts necessary to prove copyright infringement by Defendant.

(a) Plaintiff's ownership of valid copyrights

First, Plaintiff adequately alleges its ownership of nine (9) copyrights at issue. *See Compl. at ¶19, and Ex. "M" - "U," thereto.* A federal registration of a copyright constitutes prima facie evidence of its validity and of plaintiff's exclusive rights to the copyright. *See Feist Pubs., Inc.*, 499 U.S. at 361.

///

///

(b) Defendant's copying of original elements of Plaintiff's
works

Second, Plaintiff adequately alleges infringement of these copyrighted works by Defendant who, without authorization or consent, distributed counterfeit Zumba Fitness® 4 DVD box sets, including the Zumba® DVDs therein, by means of eBay, seller ID "showswel." See Compl. at ¶24-25, and Ex. "V," thereto; *see also* Sakalian Decl. at ¶3-4, and Ex. "A"- "D," thereto.

3. Trademark Dilution Claim

In order to prove federal trademark dilution, a plaintiff must show that: the mark at issue is famous, the defendant is making a commercial use of the mark in commerce, the defendant's use began after the mark became famous, and the defendant's use of the mark dilutes the quality of the mark by diminishing the capacity of the mark to identify and distinguish goods and services. *See Panavision, Int'l v. Torppen*, 141 F.3d 1316, 1324 (9th Cir.1998).

In deciding whether a mark is famous, the courts will look to the following factors: the degree of inherent or acquired distinctiveness; the duration and extent of use; the amount of advertising and publicity; the geographic extent of the market; the channels of trade; the degree of recognition in trading areas; any use of similar marks by third parties; and whether the mark is registered. 15 U.S.C. § 1125(c); *see also Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026 (2nd Cir.1989). Once the prerequisites for a dilution claims are satisfied, the owner of a mark can bring an action against any use of that mark that dilutes the distinctive quality of that mark, either through "blurring" or "tarnishment." Tarnishment occurs when the mark is cast in an unflattering light, typically through its association with inferior or unseemly products or services. *See Toys "R" Us v. Akkaoui*, 40 U.S.P.Q.2d (BNA) 1836 (N.D. Cal. 1996).

///

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(a) **Plaintiff's ownership of famous marks**

Plaintiff's Zumba® products, and specifically the Zumba® Fitness 4 DVD box set and the Zumba® DVDs therein, have become increasingly popular and famous over the past several years, particularly in light of the company's advertising as well as consumer word of mouth referrals given the effectiveness of the products. Plaintiff has spent substantial time, money and effort in developing consumer recognition and awareness of its marks, copyrights and products. Plaintiff has spent an enormous amount of money on print and internet advertising in order to inform consumers of the benefits Plaintiff's products and services. Through the extensive use of the Plaintiff's marks, Plaintiff has built up and developed significant goodwill in its entire fitness product line. A wide array of newspapers, magazines and television networks have included advertising of Plaintiff's products, which are immediately identified by Plaintiff's marks and have featured full length articles describing both the popularity and benefits of the Zumba® Fitness products, apparel and programs. These periodicals and new media outlets have included, The Washington Post, CNN, The New York Times, Shape Magazine, The Wall Street Journal, Redbook, Time Magazine, Readers Digest, The London Times, Reuters, SELF Magazine, Cosmopolitan Magazine, Variety Magazine as well as many others. *See* Compl. at ¶12.

As a result of Plaintiff's efforts, the high degree of promotion and the quality and popularity of the Zumba® products and classes, the Zumba® marks and the Zumba® fitness DVDs, products, and services have been prominently placed in the minds of the public. Consumers, purchasers and the members of the public have become familiar with the Plaintiff's intellectual property, fitness DVDs, fitness programs and other products and services, and have come to recognize the Zumba® marks, products and services and associate them exclusively with Plaintiff – Plaintiff has acquired a valuable reputation and goodwill among the public as a result of such association. Indeed, the Zumba® marks are famous in

1 the United States. *See* Compl. at ¶14.

2 **(b) Defendant's commercial use of Plaintiff's famous**
3 **marks**

4 On March 13, 2011, Plaintiff purchased a purported "ZUMBA FITNESS 4
5 DVD Box Set Factory Sealed" from Defendant utilizing eBay, under seller ID
6 "showswel," for a cost of \$63.99 charged to the PayPal electronic payment account
7 of Plaintiff's investigator. *See* Compl. at ¶24, and Ex. "V," thereto; *see also*
8 Sakalian Decl. at ¶3, and Ex. "A" - "B," thereto. The product purchased from
9 Defendant was inspected to determine authenticity. The inspection of the
10 purchased item confirmed that the item Defendant sold to the investigator were, in
11 fact, counterfeit and unauthorized Zumba® fitness DVDs. *See* Compl. at ¶25; *see*
12 *also* Sakalian Decl. at ¶4, and Ex. "C" - "D," thereto.

13 **(c) Defendant's use began after Plaintiff's marks were**
14 **famous**

15 Plaintiff uses its Zumba® and Zumba Fitness® trademarks on and in
16 connection with its Zumba® Fitness 4 DVD box set, among other products and
17 services, and has been using its Zumba® trademarks since as early as 2001.

18 Defendant sold at least four (4) counterfeit versions of Plaintiff's Zumba®
19 Fitness 4 DVD box sets, or, sixteen (16) individual counterfeit Zumba® fitness
20 DVDs, between March 11, 2011 to March 19, 2011 on eBay, seller ID
21 "showswel." *See* Sakalian Decl. at ¶9, and Ex. "F," thereto.

22 **(d) Defendant's use tarnishes the quality of Plaintiff's**
23 **marks**

24 Defendant has tarnished Plaintiff's Zumba® and Zumba Fitness®
25 trademarks by selling inferior quality counterfeit fitness merchandise bearing
26 Plaintiff's famous marks. Tarnishment occurs when the mark is cast in an
27 unflattering light, typically through its association with inferior or unseemly
28 products or services. *See Toys "R" Us v. Akkaoui*, 40 U.S.P.Q.2d (BNA) 1836

(N.D. Cal. 1996). Defendant has cast Plaintiff's marks in an unflattering light by offering for sale, selling, and distributing counterfeit versions of Plaintiff's Zumba® Fitness 4 DVD box sets.

D. Sum of Money at Stake

The prevailing party in an action for willful trademark infringement, willful copyright infringement, and willful trademark dilution is entitled to, *inter alia*, statutory damages, reasonable attorney's fees, recovery of costs, and appropriate injunctive relief. Plaintiff has alleged in its Complaint that Defendant engaged in intentional, knowing, and willful acts of infringement of Plaintiff's Zumba® and Zumba Fitness® trademarks and copyrights, and intentionally and knowingly diluted said trademarks. Defendant has failed to respond to these serious allegations despite notice thereof. In addition, Plaintiff has submitted evidence to show that Defendant was on notice that he was engaging in infringing activity, or that he should have known that he was engaged in infringing conduct.

The Court should therefore find that pursuant to the relevant sections of the *Trademark Act*, *Copyright Act*, and the *Lanham Act*, and the facts established by Plaintiff for purposes of this motion, an enhancement of electable statutory damages is warranted, in addition to attorneys' fees and costs, thereby putting a total of no less than \$4,150,000.00 of statutory damages at stake.

1. Statutory Damages for Trademark Infringement and Trademark Dilution

The *Trademark Act* provides that in a case involving the use of a counterfeit mark in connection with the sale, offering for sale, or distribution of goods and services, or any willful violation under section 43(c) of the *Lanham Act* (15 U.S.C. 1125(c)), the plaintiff may elect to recover statutory damages in the amount of not less than \$1,000.00 or more than \$200,000.00 per counterfeit mark per type of goods sold, offered for sale, or distributed. 15 U.S.C. § 1117(c)(1). Plaintiff seeks maximum statutory damages of \$200,000.00 for each of

1 Defendant's use of Plaintiff's Zumba® and Zumba Fitness® trademarks. In
2 addition, if the Court finds that the use of the counterfeit mark was willful, the
3 plaintiff may be granted an award of statutory damages of not more than
4 \$2,000,000.00 per counterfeit mark per type of goods sold, offered for sale, or
5 distributed. 15 U.S.C. § 1117(c)(2). Plaintiff has alleged that Defendant's use was
6 willful, an allegation that Defendant has failed to respond to, and Plaintiff has
7 provided evidence to show that Defendant knew, or should have known, that the
8 goods he was selling were, in fact, counterfeit.

9 Based on the foregoing, Plaintiff seeks statutory damages of \$200,000.00 for
10 Defendant's infringing use of Plaintiff's Zumba® and Zumba Fitness® trademarks
11 totaling \$400,000.00 for trademark infringement and dilution pursuant to 15 U.S.C.
12 § 1117(c)(1).

13 **2. Statutory Damages for Copyright Infringement**

14 Similarly, the *Copyright Act* provides that the statutory range for each
15 copyright infringement is between \$750.00 and \$30,000.00 for all infringements
16 involved in the action. Specifically, Plaintiff is entitled to a default judgment
17 against Defendant for the maximum statutory amount of no less than \$30,000.00,
18 as provided for under 17 U.S.C. § 504(c)(1).

19 In addition to seeking ordinary statutory damages, Plaintiff may seek the
20 maximum statutory enhancement for willful infringement, for a total of
21 \$150,000.00 pursuant to 17 U.S.C. § 504(c)(2). 17 U.S.C. § 504(c)(2) provides
22 that: "[in] a case where the copyright owner sustains the burden of proving, and
23 the court finds, that infringement was committed willfully, the court in its
24 discretion may increase the award of statutory damages to a sum of not more than
25 \$150,000.00."

26 Due to Defendant's violation of Plaintiff's copyright rights, this Court
27 should award statutory damages of no less than \$30,000.00 for all copyright
28 infringements in this action.

1 **E. No Possibility of Dispute Concerning Material Facts**

2 There is no information before the Court concerning a possible dispute of
3 material facts because Defendant has not appeared in this action.

4 **F. Default Not Due to Excusable Neglect**

5 Defendant's default in this matter was not due to excusable neglect.
6 Plaintiff's Complaint was filed on March 23, 2011, and Defendant was served with
7 a copy of the Summons and Complaint on April 8, 2011 at his place of residence.
8 *See Sakalian Decl. at ¶5.* Default was entered by the Clerk on May 17, 2011. *See*
9 *Sakalian Decl. at ¶6.*

10 **G. Policy Favoring Decisions on the Merits Does Not Outweigh**
11 **Plaintiff's Right to Relief**

12 Any policy in favor of deciding cases on the merits does not outweigh
13 Plaintiff's rights to relief in this matter. Defendant had every opportunity to
14 defend himself in this action, or otherwise responded to Plaintiff's Complaint,
15 despite notice thereof. Favoring this policy of deciding cases on the merits in the
16 case before this Court would effectively condone and reward a Defendant who
17 refuses to appear in order to decide the case on the merits.

18 **IV. REMEDIES**

19 Plaintiff is required to prove all damages sought in the Complaint. *Fed.R.*
20 *Civ.P.* 54(c); *see also Philip Morris USA, Inc. v. Castworld Products, Inc.*, 219
21 *F.R.D.* 494, 498 (C.D. Cal. 2003). In determining damages, a court can rely on the
22 declarations submitted by Plaintiff or order a full evidentiary hearing. *Fed.R. Civ.P.*
23 55(b)(2). Plaintiff's burden in "proving up" damages is relatively lenient. *See*
24 *Philip Morris*, 219 *F.R.D.* at 498. In this instance, Plaintiff seeks statutory
25 damages, reasonable attorney's fees, costs, and a permanent injunction for
26 Defendant's willful infringement of Plaintiff's Zumba® and Zumba Fitness®
27 trademarks and copyrights.

28 ///

1 **A. Statutory Damages**

2 Plaintiff seeks a statutory award of not less than \$430,000.00 as
3 compensation for Plaintiff's damages, as a punishment for Defendant's willful
4 conduct, and as a deterrent to future infringement by Defendant and other pirates,
5 infringers and counterfeiters.

6 Under the *Lanham Act*, where a court finds that the use of a counterfeit mark
7 was willful, statutory damages "not more than \$2,000,000 for counterfeit mark per
8 type of goods or services sold, offered for sale, or distributed, as the court
9 considers just" are available. 15 *U.S.C.* §1117(c). While willful infringement
10 requires "knowledge that the defendant's conduct constitutes trademark
11 infringement," *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, n.3 (9th Cir.
12 1990), willfulness can be inferred from a defendant's failure to defend. *See Philip*
13 *Morris USA, Inc. v. Castworld Products, Inc.*, 219 F.R.D. 494, 501 (C.D. 2003). It
14 should also be noted that "[c]ourts faced with determining statutory damages under
15 the [Lanham] Act have analogized to the body of case law interpreting similar
16 provisions in the Copyright Act." *See Philip Morris*, 219 F.R.D. at 501. The
17 Supreme Court has held that deterrence of future infringement is an important
18 factor in determining damages under the Copyright Act, stating that: "A rule of
19 liability which merely takes away the profits from an infringement would offer
20 little discouragement to infringers. It would fall short of an effective sanction for
21 enforcement of copyright policy. The statutory rule, formulated after long
22 experience not merely compels restitution of profit and reparation for injury, but
23 also is designed to discourage wrongful conduct. The discretion of the court is
24 wide enough to permit a resort to statutory damages for such purpose. Even for
25 uninjurious and unprofitable invasions of copyright the court may, if it deems just,
26 impose a liability within the statutory limits to sanction and vindicate the statutory
27 policy." *Id.* (applying copyright statutory damages jurisprudence to the *Lanham*
28 *Act* and citing *F.W. Woolsworth Co. v. Contemporary Arts*, 344 U.S. 228, 233

1 (1952)).

2 In determining whether the amount of statutory damages sought is
3 reasonable, courts will look to see if the amount is calculated to serve the purposes
4 of awarding statutory damages, including compensation for lost profits,
5 punishment of willful infringing conduct, and the deterrence of infringing activity.
6 See Philip Morris, 219 F.R.D. at 501-502. However, a plaintiff may elect statutory
7 damages for copyright infringement, and therefore, trademark infringement
8 “regardless of the adequacy of the evidence offered as to his actual damages and
9 the amount of defendant’s profits.” See Columbia Pictures Television, Inc. v.
10 Krypton Broadcasting of Birmingham, Inc., F.3d 1186, 1194 (9th Cir. 2001).

11 Defendant’s demand of no less than \$430,000.00 dollars is reasonably
12 calculated to accomplish the purposes of awarding statutory damages. Plaintiff has
13 set forth adequate evidence, in both the Complaint and by way of declaration to
14 establish that Defendant’s conduct was willful. Defendant failed to comply with
15 the judicial process and has not in any way participated in the present litigation.
16 This allows for the inference that Defendant’s conduct was in fact willful. See
17 Philip Morris USA, Inc. v. Castworld Products, Inc., 219 F.R.D. 494, 501(C.D.
18 2003) (holding that defendant willfully infringed plaintiff’s trademark based on
19 plaintiff’s allegations of willful infringement and defendant’s “failure to comply
20 with the judicial process or to participate in any way in the litigation”).
21 Additionally, willfulness can be inferred from the declarations and exhibits
22 attached to this application for default judgment. *Fed.R. Civ.P.* 55(b)(2); see also
23 Adobe System Inc. v. Brooks, 3 2009 WL 593343 (N.D. 2009) (Unpublished).
24 Defendant’s eBay Feedback Profile evidences his sale of at least 4 counterfeit
25 Zumba®-branded fitness products, or 16 individual counterfeit Zumba® Fitness
26 DVDs. See Sakalian Decl. at ¶9, and Ex. “F,” thereto. Given that Plaintiff’s
27 investigator received a counterfeit product from Defendant, and given the price at
28 which Defendant offered for sale and sold his purported Zumba®- and Zumba

1 Fitness®-branded merchandise, it is inferable that all of the Zumba® Fitness DVD
2 box sets, and the Zumba® DVDs therein, sold by Defendant are indeed counterfeit.
3 This evidence more than suggests that Defendant's conduct was not only
4 knowledgeable, but purposeful, entitling Plaintiff to the maximum allowable
5 statutory damages.

6 However, Plaintiff is not asking for the maximum allowable statutory
7 damages. Plaintiff has alleged that Defendant has willfully infringed Plaintiff's
8 registered Zumba® and Zumba Fitness® marks. Under the *Lanham Act*, this
9 would allow for a maximum of \$4,000,000.00 dollars in statutory damages. Yet,
10 Plaintiff only seeks \$430,000.00 in statutory damages for trademark and copyright
11 infringement. With the imposition of this award, Plaintiff seeks to deter Defendant
12 and similarly situated counterfeiters, pirates and infringers from bringing into
13 commerce counterfeit Zumba®-branded products and DVDs, and from exhibiting
14 total disregard for the *Federal Rules of Civil Procedure*. Plaintiff also seeks
15 compensation for damages (the total extent of which cannot be known as
16 Defendant has failed to participate in this litigation) caused by Defendant's
17 infringement and to punish Defendant appropriately for his extensive piratical
18 activities (the true extent of which is also unknown to Plaintiff as Defendant has
19 failed to meaningfully take part in this litigation).

20 Accordingly, \$430,000.00 is reasonably calculated to accomplish the
21 purposes of providing statutory damages under the *Lanham Act* and the *Copyright*
22 *Act*.

23 **B. Costs**

24 Pursuant to 15 U.S.C. §1117(a), Plaintiff is entitled to judgment against said
25 Defendant for recovery of total costs Plaintiff has incurred in this action due to
26 Defendant's violation of 15 U.S.C. §1125(a) and willful violation of 15 U.S.C.
27 §1125(c) in the amount of \$731.07. See Sakalian Decl. at ¶12.

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1 **C. Attorneys' Fees**

2 Pursuant to 15 *U.S.C.* §1117(a), Plaintiff is entitled to judgment against
 3 Defendant for reasonable attorneys' fees incurred by Plaintiff in the prosecution of
 4 this action, due to the "exceptional circumstances" surrounding Defendant's willful
 5 violation of 15 *U.S.C.* §1125(c). *See Lindy Pen Co. v. Bic Pen Corp.*, 982 F. 2d
 6 1400, 1409 (9th Cir. 1993) (stating that a case is "exceptional" when infringement
 7 is "malicious, fraudulent, deliberate, or willful."); *see also Taylor Made Golf Co.,*
 8 *Inc., v. Carsten Sports Ltd.*, 175 F.R.D. 658 (holding that a case may be deemed
 9 "exceptional," and merit an award of attorney's fees under the Lanham Act, when
 10 Defendant disregards the proceedings and does not appear). Pursuant to 15 *U.S.C.*
 11 §1117(b), Plaintiff is also entitled to judgment against Defendant for reasonable
 12 attorneys' fees due to Defendant's willful violation of 15 *U.S.C.* §1114(1)(a) (as
 13 provided for under 15 *U.S.C.* §1117(e)). Under Local Rule 55-3, attorneys' fees
 14 shall be calculated according to a fee schedule based upon the amount of the
 15 default judgment absent costs. Pursuant to the Local Rules, Plaintiff is entitled to
 16 \$5,600.00 in attorneys' fees. *See Sakalian Decl.* at ¶13.

17 **D. Injunctive Relief**

18 The Lanham Act gives the Court "[p]ower to grant injunctions according to
 19 the rules of equity and upon such terms as the court may deem reasonable, to
 20 prevent the violation" of a mark holder's rights. 15 *U.S.C.* § 1116(a); *see also*
 21 *PepsiCo Inc. v. Cal. Sec. Cans*, 238 F.Supp.2d 1172, 1177-78 (C.D. Cal. 2002).
 22 Plaintiff seeks an injunction covering three items listed below as they relate to
 23 prevention of future infringing activity.

24 Plaintiff is entitled to a permanent injunction against Defendant and all of
 25 his agents, officers, employees, representatives, successors, assigns, attorneys, and
 26 all other persons acting for, with, by, through, or under authority from Defendant,
 27 or in concert or participation with Defendant: (1) enjoining and permanently
 28 restraining Defendant from manufacturing, advertising, distributing, offering for

1 sale, selling, whether directly or indirectly, counterfeit Zumba®- and Zumba
 2 Fitness®-branded merchandise, including any merchandise of any kind bearing
 3 Plaintiff's marks or names that are confusingly similar to the trademarks, trade
 4 names, designs or logos of Plaintiff; (2) enjoining and permanently restraining
 5 Defendant from using Plaintiff's marks or any copy, reproduction, or colorable
 6 imitation, or confusingly similar simulation of Plaintiff's marks on or in
 7 connection with the promotion, advertising, distribution, manufacture or sale of
 8 Defendant's goods; (3) ordering Defendant to cancel, withdraw and recall all his
 9 promotions, advertisements and merchandise bearing Plaintiff's marks or any
 10 confusingly similar simulation to Plaintiff's marks, which have been published,
 11 placed or shipped by Defendant or under Defendant's authority, to any person,
 12 entity, or customer, including, without limitation, any publisher, agency,
 13 wholesaler, distributor, retailer, consignor or marketer, and also deliver to each
 14 publisher or customer a copy of this Court's order as it relates to said injunctive
 15 relief against Defendant.

16 V. CONCLUSION

17 For the foregoing reasons and in the manner set forth above, the Court
 18 should grant Plaintiff's Motion for Entry of Default Judgment by Court against
 19 Defendant for damages totaling no less than \$430,000.00, along with the requested
 20 injunctive relief.

21
 22 DATED: June 9, 2011

JOHNSON & PHAM, LLP

23
 24
 25 By: 

Ani Sakalian, Esq.

Attorneys for Plaintiff

ZUMBA FITNESS, LLC

DECLARATION OF ANI SAKALIAN

I, ANI SAKALIAN, declare as follows:

1. I am an attorney at law licensed to practice in the State of California and am an associate with the law firm of Johnson & Pham, LLP, counsel of record for Plaintiff ZUMBA FITNESS, LLC ("Plaintiff"). The following is within my personal knowledge and if called upon as a witness, I could and would competently testify thereto.

2. Upon investigation into this matter, I have determined that Defendant WILLIAM CHESTER MOORE ("Defendant") resides at 528 Wilson Road, Annapolis, Maryland 21401-1052.

3. On March 13, 2011, Plaintiff purchased a purported "ZUMBA FITNESS 4 DVD Box Set Factory Sealed" from Defendant utilizing the Internet auction website known as eBay.com ("eBay"), under seller ID "showswel," for a cost of \$63.99 charged to the PayPal electronic payment account of Plaintiff's investigator. A true and correct copy of Defendant's eBay item listing offering for sale a "ZUMBA FITNESS 4 DVD Box Set Factory Sealed" is attached hereto and marked as Exhibit "A." In addition, a true and correct copy of the PayPal purchase receipt evidencing and identifying Defendant as the seller of a "ZUMBA FITNESS 4 DVD Box Set Factory Sealed" on eBay, seller ID "showswel," is attached hereto and marked as Exhibit "B." *See also* Compl., and Ex. "V," thereto.

4. The product purchased from Defendant was inspected to determine authenticity. The inspection of the purchased item confirmed that the item Defendant sold to the investigator were, in fact, counterfeit and unauthorized Zumba® Fitness DVDs and related materials. Photographs of an authentic Zumba® Fitness DVD box set offered by Plaintiff to consumers in the United States, along with the relevant Zumba® Fitness DVDs, and materials therein, are attached hereto and collectively marked as Exhibit "C." Photographs of the package received from Defendant containing a counterfeit "ZUMBA FITNESS 4

1 DVD Box Set Factory Sealed” are attached hereto and collectively marked as
2 Exhibit “D.”

3 5. Plaintiff filed its Complaint against Defendant on March 23, 2011,
4 and Defendant was personally served with a copy of the Summons and Complaint
5 on April 8, 2011 at 528 Wilson Road, Annapolis, Maryland 21401-1052.

6 6. Plaintiff requested entry of default against Defendant on May 5, 2011,
7 and the clerk entered default of said Defendant on May 17, 2011.

8 7. Plaintiff’s website – www.zumba.com – contains an “ABOUT” link
9 which provides information “ABOUT ZUMBA® FITNESS.” A true and correct
10 copy of Plaintiff’s “ABOUT ZUMBA® FITNESS” website page is attached
11 hereto and marked as Exhibit “E.”

12 8. An authentic Zumba® Fitness DVD box set, which, amongst other
13 materials, contains four (4) Zumba® Fitness DVDs, was offered for sale by
14 Plaintiff for a cost of approximately \$58.95 - \$60.00.

15 9. Defendant has sold at least four (4) counterfeit versions of Plaintiff’s
16 Zumba® Fitness 4 DVD box sets, or 16 individual counterfeit Zumba® Fitness
17 DVDs, between March 11, 2011 to March 19, 2011 on eBay.com, seller ID
18 “showswel.” A true and correct copy of Defendant’s eBay “Feedback Profile”
19 referencing these sales is attached hereto and marked as Exhibit “F.”

20 10. Defendant is not an infant or an incompetent or in military service or
21 otherwise exempted under the Soldiers’ and Sailors’ Civil Relief Act of 1940.

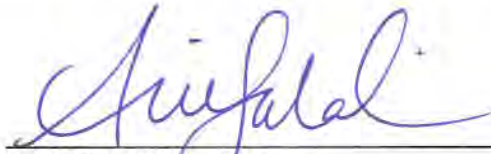
22 11. Notice of this application for default judgment by the Court was
23 served on Defendant on June 9, 2011 by United States Postal Mail as required
24 by Local Rule 14.12.1.

25 12. Plaintiff’s total costs including but not limited to filing of the
26 Complaint, service of the Summons and Complaint, and copying charges total
27 approximately \$731.07.

28 ///

1 13. Plaintiff seeks attorneys' fees in the prosecution of this action in the
2 amount of \$5,600.00 pursuant to the fee schedule established by Local Rule 55-3.

3 I declare under penalty of perjury under the laws of the State of California
4 that the foregoing is true and correct. Executed this 9th day of June, 2011, at
5 Woodland Hills, California.

6 
7 _____
8 Ani Sakalian, Esq.

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Johnson & Pham 6355 Topanga Canyon Blvd., Suite 115, Woodland Hills, CA 91367. On June 9, 2011, I served the within document(s):

**NOTICE OF MOTION AND MOTION FOR ENTRY OF
DEFAULT JUDGMENT BY COURT; MEMORANDUM OF
POINTS AND AUTHORITIES; DECLARATION OF ANI
SAKALIAN IN SUPPORT THEREOF AND [PROPOSED]
JUDGMENT**

- ☐ FACSIMILE - by transmitting via facsimile the document(s) listed above to the fax number(s) set forth on the attached Telecommunications Cover Page(s) on this date before 5:00 p.m.
- ☒ MAIL - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.
- ☐ PERSONAL SERVICE - by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ OVERNIGHT COURIER - by placing the document(s) listed above in a sealed envelope with shipping prepaid, and depositing in a collection box for next day delivery to the person(s) at the address(es) set forth below via UNITED PARCEL SERVICE.

William Chester Moore
528 Wilson Rd.
Annapolis, MD 21401

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 9, 2011, at Los Angeles, California.



Nora Ivy Ounjian